PD-0287-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/7/2020 10:19 PM
Accepted 12/8/2020 10:56 AM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
12/8/2020
DEANA WILLIAMSON, CLERK

PD-0287-20
In the Court of Criminal Appeals of Texas
At Austin

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No. 14-17-00400-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 1096930
In the 184th District Court
Of Harris County, Texas

———♦———

Happy Pham
Appellant

v.

The State of Texas
Appellee

———♦———

State's Brief on Discretionary Review

———♦———

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> **Happy Pham**

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Trial Court:

> **Jan Krocker**, presiding judge

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Statement of the Case

The appellant was charged by complaint with murder in 2006. (CR 8). After nine years on the lam, he was arrested and indicted for murder in 2016. (CR 21; 2 RR 6). The appellant pleaded not guilty, but a jury found him guilty as charged. (4 RR 10-11; CR 269). The jury assessed punishment at confinement for life. (CR 281). The trial court certified the appellant's right of appeal and the appellant filed a notice of appeal. (CR 289, 290).

On direct appeal, a divided panel of the Fourteenth Court affirmed the trial court's judgment. *Pham v. State*, 595 S.W.3d 769 (Tex. App.—Houston [14th Dist.] 2019, pet. granted). Justice Bourliot issued a "dissenting" opinion that would have remanded for a new punishment hearing, but which did not mention the appellant's guilt-phase points. *Id.* at *789 (Bourliot, J., dissenting).

Appellant's Issues Presented

1. Whether an attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy.

2. Whether trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed.

3. Whether the Court of Appeals erred by holding that because appellant used deadly force, rather than the threat of deadly force, he was not entitled to an instruction on self-defense pursuant to Tex. Pen. Code § 9.04.

Statement of Facts

Thuy "Lindy" Le was eating with her boyfriend, Pierre Mai, at the Cajun Kitchen restaurant. (4 R.R. 87, 96). Lindy heard a gunshot. (4 R.R. 103). When she looked up, she saw the appellant—her ex-boyfriend—angrily walking up to the table and saying, "Motherfucker, you in my hood." (4 RR 93, 101, 108). The appellant continued shooting, striking Pierre twice—once in the stomach and once in the leg. (4 R.R. 101, 103-104). Pierre was immediately paralyzed and fell

to the ground. (4 R.R. 104; 5 R.R. 69-70). The appellant fled the scene. (4 R.R. 122).

Houston Police Detectives Bart Nabors and J.T. Wyers got surveillance video from inside the restaurant that showed the appellant brandishing his gun and approaching Pierre. (5 RR 17; State's Exhibit 41; State's Exhibit 42). The detectives each tried to serve an arrest warrant at the appellant's home, but he was not there. (5 R.R. 23). They spoke with the appellant's parents and asked them to assist in his arrest, but none of the appellant's family or friends ever helped locate him. (5 R.R. 23-24).

Gulf Coast Violent Offenders Task Force Officer Douglas Day worked to locate the appellant, but found that he had no car, no driver's license, no work history, no utilities, and no phone service, suggesting the appellant was intentionally hiding. (5 R.R. 104-105). Day and Nabors worked with Crime Stoppers to distribute fliers to the media, and the appellant was featured on America's Most Wanted. (5 R.R. 114-116). Finally, in February 2016, Day tracked down an address for the appellant through a Crime Stoppers tip. (5 R.R. 98-103). The appellant was arrested at his residence; officers recovered $25,000 in cash, two handguns, and marijuana. (8 R.R. 8).

At trial, the appellant testified he shot Pierre in self-defense. (6 RR 99-112). He claimed he brought a gun to the restaurant because he knew Pierre would be there and he was "on guard." (6 RR 92, 97). When he entered he saw Pierre "reaching down," which he believed was an effort to draw a gun. (6 RR 104). One of the people at Pierre's table "jump[ed]" up, so the appellant drew his gun to "[d]iscourage a conflict." (6 RR 103-04). The appellant said Pierre struggled to get out of his chair, but when he did he pulled out his gun and pointed it at the appellant, at which point the appellant shot first, striking Pierre. (6 RR 105-10). When Pierre fell down "his gun came up again," so the appellant shot him a second time. (6 RR 112).

Summary of the Argument

This Court granted review of three issues. The appellant's third issue relates to the guilt phase, but his first two issues relate only to the punishment phase. The State will address his third issue first.

The appellant's third issue complains that the trial court erred by not instructing the jury on Penal Code § 9.04, which relates to the threat of deadly force. The Fourteenth Court rejected this argument because the undisputed evidence showed that the appellant did not merely threaten Pierre, but shot him. Before this Court the appellant

claims the instruction was necessary to explain the law for the pre-shooting events. Whether a defendant charged with using deadly force can be entitled to an instruction on the legality of mere threats is a question of first impression this Court should not address here because, under these facts, the appellant suffered no harm from the omission.

The appellant's first two issues complain about the trial court's denial of his motion for new trial, which alleged ineffective assistance of counsel during the punishment phase. Specifically the appellant claims his trial counsel failed to conduct an appropriate investigation to find "mitigation witnesses." But when given the chance to produce affidavits of what potential witnesses might have said, the appellant produced a series of affidavits providing marginal evidence from witnesses who would have subject to devastating cross-examination. The trial court did not abuse its discretion in finding the appellant failed to show he was harmed by defense counsel's defective investigation. The appellant's claim that he is entitled to a presumption of prejudice was not presented to or ruled on by the Fourteenth Court, and, at any rate, is counter to precedent from this Court and the Supreme Court of the United States.

Reply to Issue Three

The appellant was not harmed by any error in not instructing the jury on the law as it relates to the threat of deadly force because the legality of his threats was not relevant to the verdict.

The appellant's third issue challenges the trial court's denial of his request to instruct the jury on Penal Code Section 9.04. (Appellant's Brief at 39-42). As a legal proposition, the appellant's issue is somewhat interesting—can a defendant charged with using deadly force be entitled to an instruction about *threats* of deadly force? But as applied to this case the answer is irrelevant because this appellant suffered no harm from the denial of the instruction.

The appellant asked the trial court to instruct the jury on Penal Code Section 9.04, which describes the legal import of threats in a self-defense case:

> The threat of force is justified when the use of force is justified by this chapter. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force.

TEX. PENAL CODE § 9.04; (6 RR 171-74). The appellant claimed this was law applicable to the case because the appellant threatened Pierre before shooting him, and Section 9.04 would help the jury determine

"at what point to apply the secondary deadly force charge and what conduct is covered by that." (6 RR 173).

The trial court denied the request because it did not believe Section 9.04 was relevant: "But the case isn't about whether or not he had the right to threaten the complainant.… the case is about whether or not he had the right to shoot because the other person was using deadly force." (6 RR 174). The appellant raised this matter in a motion for new trial, which the trial court denied after a hearing. (CR 298, 368).

Citing *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017), the appellant raised this matter on appeal. The Fourteenth Court rejected the claim because the appellant used deadly force, not just the threat of deadly force. *Pham v. State*, 595 S.W.3d 769 (Tex. App.—Houston [14th Dist.] 2019, pet. granted).

In this Court, the appellant argues it was error to omit the 9.04 charge because that "deprived Pham [of] the ability to argue that the display of his gun was justified under the law." (Appellant's Brief at 41). But unlike the defendant in *Gamino*—which was an aggravated-assault-by-threat case—the appellant was not charged with displaying his gun. There was no way for the jury to use Section 9.04 to acquit the appellant.

The appellant claims the State "exploit[ed] the error by arguing that [the appellant's] lawful act of displaying his gun provoked the difficulty with the complainant and therefore argued for the jury to find against him on the issue of self-defense." (Appellant's Brief at 41). The jury was instructed on provocation and the prosecutor argued the jury should reject the appellant's self-defense claim based on provocation. (CR 264-65; 7 RR 38-39).

The appellant's argument makes no sense in light of the jury charge. The jury was instructed that to find against the appellant based on provocation it had to find, beyond a reasonable doubt, he acted "with the intent … to produce the occasion for shooting Pierre Mai, and to bring on the difficulty with the said Pierre Mai..." (CR 264). If the jury found that beyond a reasonable doubt, it would have necessarily rejected any instruction under 9.04, which justifies the threat of deadly force only "as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary." If the jury did *not* find against the appellant on provocation, the appellant offers no other plausible way the jury could have used 9.04 in his favor.

It's worth noting the appellant testified that Pierre went for his gun first. If the jury believed him it would have believed he was justified in using deadly force from the very beginning.

The appellant has not cited a case holding that a defendant who used deadly force was entitled to a 9.04 instruction, and the State is unaware of any. The State supposes there might be a situation where a 9.04 instruction would be relevant to deciding the legality of the actual use of deadly force. But it's not this case.

The appellant objected to the omitted instruction, so he need show only "some" harm to prevail on appeal. But he cannot. This case is a classic example of "theoretical harm": The requested instruction marginally favored the defendant, but not on a legally relevant issue. Whether the appellant was justified in brandishing a gun before shooting Pierre does not control whether the shooting was justified.

Rather than address the legal question of whether a defendant can be entitled to a 9.04 instruction in a homicide case—a question on which neither party has found worthwhile authority—this Court should reject the appellant's third issue because any error would not warrant reversal.

Reply to Issues One and Two

The trial court did not abuse its discretion in concluding the appellant was not harmed by his counsel's deficient representation.

The appellant has two issues regarding his claim that his trial counsel was ineffective for not conducting an adequate investigation. The State will give short answers to his questions, and then discuss the matter in more detail.

> **Issue 1**: "Whether an attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy."
>
> **Answer**: To show ineffective assistance a defendant must show trial counsel's deficient performance harmed him. The appellant can't do that, as shown by the fact that neither in the trial court nor in the Fourteenth Court nor in this Court has he actually discussed in detail how his proposed witnesses would have helped him.
>
> **Issue 2**: "Whether trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed."
>
> **Answer**: Controlling precedent from this Court and the Supreme Court holds that when a defense attorney presents witnesses and arguments—like trial counsel did here—a defendant is not "constructively" denied representation of counsel and he must show harm to win an ineffective-assistance claim.

I. Factual Background: Trial counsel admitted he did not investigate possible punishment phase witnesses. In his motion or new trial the appellant introduced nineteen affidavits from people who knew him. The trial court found these people all had credibility problems that would have caused the jury to disregard their testimony, and the Fourteenth Court agreed.

In his motion for new trial the appellant claimed his trial counsel was ineffective at the punishment phase because by, *inter alia*, not conducting an adequate investigation to locate punishment-phase witnesses. (CR 312-14). Attached to the motion was an affidavit from trial counsel admitting he conducted no investigation to find punishment witnesses, and had no strategic decision for this failure. (CR 331-33). Also attached were affidavits from nineteen individuals who knew the appellant. (CR 334-59).

At the hearing on the appellant's motion, the trial court noted a couple of problems with the affidavits. First, the evidence at trial showed it was questionable whether the appellant's family had helped him during the nine years he spent on the lam. (11 RR 13-14). Second, because of his long stint as a fugitive, affidavits of people who knew him before the murder were of "limited value." (11 RR 14). The trial court denied the motion. (11 RR 16).

The Fourteenth Court rejected the appellant's claim as well. The majority held first that, given the reality of the appellant's time as a fugitive, trial counsel was reasonable not to investigate witnesses who either "had no knowledge of appellant's current character, or possibly had knowledge of appellant's drug-dealing activities, or possibly had helped appellant elude capture." *Pham*, 595 S.W.3d at 782-83. The majority also concluded that the appellant had failed to show ineffective assistance for the same reasons the trial court rejected this claim:

> [T]he evidence appellant claims would have mitigated his punishment came from either witnesses that had not had any contact with appellant in ten years, had assisted appellant in leaving the state after the shooting, or were aware of his drug-dealing activities. In light of the testimony and video evidence, which convinced the jury that appellant did not act in self-defense, we cannot conclude there is a reasonable probability that the jury would have reached a more favorable verdict but for counsel's alleged error.

Id. at 783.

This is the only issue discussed in Justice Bourliot's dissent. Justice Bourliot spent most of her dissent discussing how important adequate investigation is for competent defense lawyering, and pointing out that a lawyer who conducts no investigation is not providing competent representation. *Id.* at 789-91 (Bourliot, J., dissenting). Her discussion of the second prong of *Strickland*—harm—is a single para-

graph. It speculates that "[a]rguably" the appellant "was constructively denied any defense at all in the penalty phase of his trial." *Id.* at 791. She would have found actual harm, though, "because counsel's lack of investigation deprived appellant of bringing any meaningful mitigation evidence to the jury to offset the State's aggravating factors." *Ibid.*

II. Legal Background: To prove ineffective assistance due to a deficient investigation, a defendant must show a thorough investigation would have produced favorable evidence.

A criminal-defense lawyer "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). To prevail on a claim of ineffective assistance based on trial counsel's breach of his duty to investigate, a defendant must show a reasonable probability that, but for counsel's breach of this duty, the result of the proceeding would have been different. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). In the context of a claim that defense counsel's deficient investigation failed to discover a witness, the defendant must show the witness was available to testify, and his testimony would have been favorable to the defense. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004).

A defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *Ex parte Moore*, 395 S.W.3d 152, 157 (Tex. Crim. App. 2013). When a defendant raises a claim of ineffective assistance in a motion for new trial, appellate review is limited to determining whether the trial court abused its discretion in denying the motion. *Odelugo v. State*, 443 S.W.3d 131, 137 (Tex. Crim. App. 2014).

III. Argument

A. Because the appellant spent nine years as a drug-dealing fugitive, the affidavits from people who knew him before the murder were stale and the affidavits from people who knew him after the murder are compromised.

The most important fact for understanding the trial court's rejection of the appellant's claim is that after the murder the appellant spent nine years as a drug-dealing fugitive.

Houston Police Detective Bart Nabors testified about the extensive efforts made to locate the appellant over the years, including having his story aired three times on America's Most Wanted. (5 RR 112-23). Eventually police received a tip that the appellant was living with a girlfriend called Casey Nguyen, but it took a couple of years to learn her real name. (5 RR 98-101). When police located the appellant, they

discovered his car, residence, and utilities were in other people's names, he had not renewed his driver license, and he had no documented work history during the prior nine years. (5 RR 104-06).

The appellant testified that when he was a fugitive he supported himself by dealing marijuana. (6 RR 120-21). When he was arrested police found $25,000 in cash and a "large amount" of marijuana. (6 RR 154-55). The appellant claimed he was using his fugitive years to save up money for a lawyer. (6 RR 155).

The appellant denied that his family or friends knew where he was, or had direct contact with him during his fugitive years. (6 RR 156-57).

The nineteen affidavits the appellant submitted as proof that his trial counsel conducted a deficient investigation fall into two categories: People who knew the appellant before the murder, and people who met him during his nine years as a drug-dealing fugitive.

As the trial court recognized, the appellant's fugitive years presented serious problems for both categories. Those witnesses who knew the appellant before the murder would have to admit either that their information about the appellant was stale, or they had been in contact with a known fugitive—wanted for murder, no less—and had

not alerted law enforcement. If they admitted the former, their testimony would be of marginal value at best; the jury was not assessing punishment on the teenager those witnesses knew but on the murdering, drug-dealing man the appellant had become. If the witnesses admitted to being in contact with the appellant during his fugitive years, their testimony would have likely been disregarded altogether; any witness willing to aid a fugitive would also be willing to lie for him at his trial.

As for the affidavits from people who met him while he was a drug-dealing fugitive, it is doubtful the jury would have regarded these witnesses as credible. If they were aware the appellant was a drug-dealing fugitive, why would the jury listen to a character assessment from a witness who knowingly befriended such a person? And if they didn't know the appellant was a drug-dealing fugitive, why would the jury listen to a character assessment from someone who did not really know the appellant?

B. The affidavits are weak evidence.

The appellant spends eighteen pages of his brief discussing his ineffective-assistance claim, but he does not discuss the content of the

affidavits. (Appellant's Brief at 21-39). Justice Bourliot's dissent also did not discuss the contents of the affidavits.

There's a good reason for those glaring omissions: The affidavits are weak evidence.

None of the affidavits mention the appellant being remorseful or reforming his ways. None mention any accomplishments or skills. None describe any particularly sympathetic circumstances in the appellant's life.

Some of the affidavits contain evidence that would harmed the appellant, like evidence that the appellant's crimes and fugitive status hurt his seemingly innocent family. Some strongly implied the appellant was in contact with his family during his fugitive years, which would have showed the appellant perjured himself on the witness stand and involved his family in his criminal lifestyle. And some contained statements the jury would have disregarded altogether as counter to the evidence they had found beyond a reasonable doubt, such as claiming the appellant was a non-violent or honest person.

The affidavits are, at best, surface-level niceties from his friends and family. They can be summarized: "Some people with marginal credibility in this case believe the appellant is an okay guy."

Exhibit 3: Lee Drones (CR 334)

Defendant's Exhibit 3 is from Lee Drones, the appellant's brother's father-in-law. Lee does not say he was available to testify at trial, so his affidavit is immaterial. *White*, 160 S.W.3d at 52.

Exhibit 4: Janet Drones (CR 335)

Defendant's Exhibit 4 is from Janet Drones, Lee's wife. Janet says she did not know the appellant to be a violent person, which would have been odd testimony in the punishment phase of a murder case where the evidence showed the defendant walked into a restaurant, swore loudly, then shot a diner. Janet "would have testified that [the appellant] has matured since this unfortunate incident [*i.e.*, the murder], that [the appellant] does not pose a danger to the community, and asked the jury for leniency." Janet did not explain how the appellant had matured, and the jury would have likely concluded, based on the nine years the appellant spent on the lam and the fact he never turned himself in, he had not matured in a good way.

Exhibit 5: Donna Tran (CR 336).

Defendant's Exhibit 5 is from Donna Tran. Donna does not say she was available to testify, thus her affidavit is immaterial. For what

it's worth, Donna describes the appellant as having been a "lighthearted, kind, and generous" child, but admits she saw the appellant less as the two of them grew up. Donna says the appellant was "never angry, aggressive or spiteful," and was a "gentle, pure, and honest person." Those descriptions conflict with the evidence the jury believed beyond a reasonable doubt.

Exhibit 6: Alicia Pham (CR 337-38)

Defendant's Exhibit 6 is from Alicia Pham, the appellant's sister. Alicia recounts several details of how the appellant was a good brother when she was growing up. But she also describes the effects of the appellant's offense and fugitive status: Their parents' health deteriorated, and threats of revenge from people associated with the victim caused the family to move. Alicia says the stress of being on the lam has hurt the appellant's mental health. This last comment suggests Alicia was in contact with the appellant during his fugitive years. At any rate, whatever positive sentiment Alicia's stories of the appellant's boyhood would have generated with the jury would have been annihilated by evidence of how the appellant's decision to flee harmed his own family. Alicia's testimony that the appellant suffered negative effects from his

own criminality would probably not affect a jury that had convicted him of murder.

Exhibit 7: Kristi Nguyen (CR 339)

Defendant's Exhibit 7 is from Kristi Nguyen, who is married to the appellant's cousin. Kristi has "always known [the appellant] to be a person who got along with everyone and [she] never witnessed any aggressive behavior towards anyone." This is incongruous with the evidence the jury believed beyond a reasonable doubt. Kristi would have also testified the appellant "would be the perfect candidate for probation." Considering the jury's sentence, it does not appear they were much interested in the appellant's suitability for probation. Moreover, the jury heard testimony from one of the appellant's brothers that he would be a good candidate for probation. (*See* 8 RR 24-35). Kristi would also have "testified about reasons for the jury to consider leniency in punishment," but she does not explain what those reasons were so it is impossible to say if they would have altered the jury's verdict.

Exhibit 8: Chan Pham (CR 340)

Defendant's Exhibit 8 is from Chan Pham, the appellant's father. Chan says the appellant used to spend a lot of time "volunteering at the temples and giving back to the community." Chan says the appellant did well in school and is "very quiet, calm and always respectful toward his elders." Chan then describes his own life story, fighting in the South Vietnamese army and eventually immigrating to America as a refugee from Communist oppression. While this is positive evidence about Chan, it reflects poorly on the appellant, showing that he turned his back on a hardworking father for a life of crime. Had Chan testified, cross-examination would have likely revealed the negative effects the family suffered because of the appellant's actions, as Alicia mentions in her affidavit.

Exhibit 9: Tran Nguyen (CR 341-42)

Defendant's Exhibit 9 is from Tran Nguyen, the appellant's girlfriend. Tran says she has been with the appellant for three years. This means she was the "Casey Nguyen" who was living with the appellant while he was a drug-dealing fugitive. (*See* 2 RR 40-45). In her affidavit, Tran says she "feel[s] that [she] can confidently speak about and asses[s] [the appellant's] character, because [she has] spent every single

day interacting with him." She then describes several positive things about the appellant, *e.g.* "He always helped out the homeless and donated to others in need." That said, had she testified to those things it would have made for uncommonly devastating cross-examination. She would have had to answer whether she knew she spent years living with a drug-dealing fugitive. If she said she did, the jury would have likely discounted her testimony vouching for the appellant's character because it would show her to be of low character herself. If she said she did not know, the jury would have discounted her testimony because it would have shown she didn't really know the appellant at all.

Exhibit 10: Michelle Jardiolin (CR 343)

Defendant's Exhibit 10 is from Michelle Jardiolin, who met the appellant through a mutual friend and has known him "for over 10 years." Given the vagueness of this time frame, it is unclear whether Michelle's description of the appellant includes the period before he became a fugitive. Michelle describes the appellant as "a very family oriented man … a great brother and son." If Michelle's knowledge of the appellant comes from before he went on the lam, this evidence is stale and superseded by later evidence showing a distinct lack of family orientation. If Michelle's knowledge of the appellant comes from his

fugitive years, it strongly suggests the appellant was in contact with his family during that period, something he denied on the witness stand and something that would cast potential testimony from family members in a bad light.

Exhibit 11: James Pham (CR 344)

Defendant's Exhibit 11 is from James Pham, a dentist who is "close to [the appellant] and his brothers." James does not say he was available to testify, thus his affidavit is immaterial. For what it's worth, James believes the appellant "is not a threat to anyone," which differs from the evidence the jury believed beyond a reasonable doubt.

Exhibit 12: Marenda Wilson-Pham (CR 345)

Defendant's Exhibit 12 is from Marenda Wilson-Pham, who is married to the appellant's brother Dung. Marenda says her knowledge of the appellant comes from before the murder. She knows the appellant to be "an intelligent, easy-going and thoughtful individual who prides himself on his dedication to his family." Describing the appellant as being dedicated to his family is not unambiguously positive or credible testimony, given the nine years he spent on the lam. Marenda would testify that the appellant "is not a danger to the community."

Describing someone who committed a murder in a crowded restaurant, supported himself as a fugitive for nine years by dealing drugs, and then lied on the witness stand about a shooting caught on video as "not a danger" is not obviously credible testimony.

Exhibit 13: Thao Ta (CR 346-47)

Defendant's Exhibit 13 is from Thao Ta. Thao "has been a close friend of [the appellant's] for the last 10 years." The affidavit is dated June 5, 2017, meaning Thao became the appellant's close friend while the appellant was a drug-dealing fugitive. Thao has several nice things to say about the appellant being a good friend, but if she testified she would have run into the same cross-examination conundrum as Tran Nguyen: Did she know the appellant was a drug dealing fugitive (making her a person of low character whose character assessments should not be trusted)[1] or not (making her someone who didn't actually know the appellant)? Thao's affidavit also describes the appellant as being "family oriented." This, as with some of the other affidavits, could have implicated the appellant's family in aiding him on the lam, something the appellant denied.

[1] Thao says she was once in debt and about to lose her house, but the appellant "sold some of his stuff" to pay her rent. If that story is about the appellant selling drugs to pay Thao's rent, that's not a reason to reduce his sentence.

Exhibit 14: Julie Jean Nguyen (CR 348-49)

Defendant's Exhibit 14 is from Julie Jean Nguyen, who has been dating one of the appellant's brothers for more than twelve years and considers the appellant a brother-in-law. Julie says that she and her family left New Orleans after Hurricane Katrina and the appellant's family "welcomed us into the family." She describes the appellant's family as "kind, caring, generous," although she does not specify what role the appellant played in this. She says the appellant is "a kind, good hearted person and would bend over backwards for anyone." This affidavit has problems like the others: If the affiant testified, she would have to answer whether her knowledge of the appellant was stale, or whether she was in contact with him while he was a fugitive.

Exhibit 15: Cuc Tran (CR 350)

Defendant's Exhibit is 15 is from Cuc Tran, the appellant's mom. She says the sorts of things one would expect a mother to say about her son's childhood (*e.g.*, "he was such a sweet and adorable baby"). She also says that "[a]s he grew older, he still maintained great relationships with his family and peers." That statement is inconsistent with the nine years he spent on the lam and his testimony he did not talk to his family during that time. Had she testified, Cuc would have

asked the jury to show mercy on the appellant so he could spend time taking care of her. Nothing in the record suggests the appellant was inclined toward caring for an elderly woman. Cuc has, at least, three other children, none of whom are murderers.

Exhibit 16: Dung Pham (CR 351)

Defendant's Exhibit 16 is from Dung Pham, one of the appellant's brothers who testified at the punishment phase. Dung describes the negative effect it had on the family when the appellant committed this offense and went into hiding. Dung concludes by saying he was not prepared to testify, and had he "understood what [his] testimony was about, [he] would have been better prepared to let the jury know why leniency was appropriate in this case and provided more details about the background of my brother and my family." Dung does not explain what else he would have said so it is impossible to determine whether that would have altered the jury's verdict.

Exhibit 17: Andrew Mao (CR 352)

Defendant's Exhibit 17 is from Andrew Mao, who is friends with one of the appellant's brothers. Andrew describes the appellant as happy, "a go lucky jokester, never a violent person." Andrew believes

the appellant is "trustworthy and someone who would never hurt anyone intentionally." Andrew would have testified that the appellant "is not a danger to the community." Andrew's thoughts on the appellant are inconsistent with the offense the jury found beyond a reasonable doubt, as well as the appellant's stint as a fugitive. It seems Andrew's knowledge of the appellant predates all that. This testimony would not have altered the verdict.

Exhibit 18: Patrick Pham (CR 353)

Defendant's Exhibit 18 is from Patrick Pham, who has known the appellant "since High School." Patrick believes the appellant is "an honest person," a belief the jury would have likely discounted as their verdict shows they believed the appellant lied on the witness stand. Patrick has never seen the appellant "exhibit any violence or anger towards others." Considering the jury had convicted the appellant of murder, they would have disregarded this testimony.

Exhibit 19: Leon Pham (CR 354)

Defendant's Exhibit 19 is from Leon Pham, who has been the appellant's friend for "a number of years." Leon does not say he was available to testify, thus his affidavit is immaterial. Leon says the same

sort of vague positive things about the appellant as many of the other affiants, *e.g.*, the appellant is "an absolute leader" and "has always been there to lend a hand when I've needed him."

Exhibit 20: Priscilla Pham (CR 355-56)

Defendant's Exhibit 20 is from Priscilla Pham. Priscilla is married to one of the appellant's childhood friends and has known him for nine years. This means she met the appellant while he was a fugitive and would have been subject to the same line of cross-examination as Than Nguyen and Thao Ta: Did she knowingly hang out with a drug-dealing fugitive? Priscilla says the appellant was "very nice, kind hearted, sincere, and very compassionate toward [her] four children." Priscilla also relates that her husband has told her positive things about the appellant, but that's inadmissible hearsay.

Exhibit 21: Tuan Nguyen (CR 357-58)

Defendant's Exhibit 21 is from Tuan Nguyen, who has known the appellant for two years. Tuan believes the appellant is "an amazing and genuine guy." Unanswered in the affidavit: Did Tuan know the appellant was a drug-dealing fugitive? If so, he isn't credible. If not, he doesn't really know the appellant.

Exhibit 22: Sandra Leon Martinez (CR 359)

Finally, Defendant's Exhibit 22 is from Sandra Leon Martinez. Sandra is close friends with the appellant's sister Alicia and has known the appellant for about twenty years. Sandra does not say she was available to testify, so her affidavit is immaterial. The extent of her comments on the appellant are that "he was very nice and welcoming," and "was always kind and friendly towards my kids and I." Given the evidence at trial and the cross-examination any defense character witness would be subject to based on the appellant's nine years as a drug-dealing fugitive, the trial court was within its discretion to believe, the sort of surface-level niceties in this and other affidavits would not have altered the jury's verdict.

C. The appellant is not entitled to a presumption of harm for an ordinary failure-to-investigate claim.

The appellant's second issue asks whether he is entitled to a presumption of harm because he was "constructively denied any defense at all in the penalty phase."

As a basic matter, the State does not believe this issue is properly before this Court. The appellant did not raise this argument in his brief to the Fourteenth Court, nor did the Fourteenth Court majority ad-

dress it. Justice Bourliot raised the issue in a single paragraph at the end of her dissent, but the extent of her commentary was just that it was an "arguabl[e]" point. *Pham*, 595 S.W.3d at 791 (Bourliot, J., dissenting). Justice Bourliot said she would have found actual harm. *Id.* at 791-92. The appellant's motion for en banc reconsideration in the Fourteenth Court did not urge this as a basis for reconsideration; all it did was quote the dissent. (Appellant's Motion for en banc Reconsideration at 3-6).

Because this argument was not presented to the Fourteenth Court, and the Fourteenth Court did not address this argument, this Court should dismiss the appellant's second issue as improvidently granted. *See Whitehead v. State*, 273 S.W.3d 285, 287 n.3 (Tex. Crim. App. 2008) ("We are a reviewing court, and it is neither proper nor our usual practice to consider issues that have not been presented to and addressed by the court of appeals."); *Keehn v. State*, 279 S.W.3d 330, 334 (Tex. Crim. App. 2009)(declining to review alternative legal basis that was not presented to or addressed by intermediate court).

If this Court chooses to address the issue, the answer is simple: No.

This Court and the Supreme Court have recognized that to justify a finding of "constructive" denial of the right to counsel, the record must show defense counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Cannon v. State*, 252 S.W.3d 342, 349-50 (Tex. Crim. App. 2008). If defense counsel generally participates in trial but a defendant complains about particular lapses, or even if defense counsel does not participate in certain parts of trial, the defendant was not "constructively" denied representation and a presumption of harm does not apply. *Bell v. Cone*, 535 U.S. 685, 696–97 (2002) (where defense counsel participated in guilt phase but did not present punishment evidence or punishment jury argument, no presumption of harm applied).

Here, defense counsel participated in the guilt phase presented multiple witnesses in the punishment phase, cross-examined the State's witnesses, and presented an argument to the jury regarding punishment. No presumption of harm applies here; this is an ordinary failure-to-investigate claim. *See, e.g.*, *State v. Frias*, 511 S.W.3d 797, 811 (Tex. App.—El Paso 2016, pet. ref'd)(rejecting application of *Cronic* presumption where defense counsel failed to investigate certain

topic, but otherwise challenged State's case at trial). The appellant cites no case where *Cronic*'s presumption of harm has been applied to a failure-to-investigate claim where defense counsel otherwise participated in trial, and the State is unaware of any such authority.

This Court should dismiss the appellant's second issue because it was not presented to or ruled on by the lower court. If this Court addresses it, it should deny it because it fails on the merits.

Without presumed harm, this Court should also reject the appellant's first issue because the trial court was within its discretion to conclude the additional witnesses not have altered the jury's verdict.

Conclusion

The State asks this Court to affirm the Fourteenth Court's judgment.

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